

LONG TERM CARE COMMUNITY COALITION

Advancing Quality, Dignity & Justice

August 4, 2017

Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Attention: CMS-3342-P
P.O. Box 8010
Baltimore, MD 21244-1850

Submitted electronically at <https://www.regulations.gov/docket?D=CMS-2017-0076>

Re. Docket ID: CMS-2017-0076, Revision of Requirements for Long-Term Care Facilities:
Arbitration Agreements CMS-3342-P

Dear Administrator Verma:

I am writing on behalf of the Long Term Care Community Coalition (LTCCC) and the organizations listed below in regard to the Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements CMS-3342-P.

LTCCC is a non-profit organization dedicated to improving care, quality of life and dignity for residents in nursing homes and other long-term residential care settings. For over 25 years, we have conducted policy studies and analyses of nursing home laws, standards and their implementation. In addition to our work on systemic nursing home issues, we work closely with residents, families and their advocates to improve care. As detailed below, based on this knowledge, expertise and experience, we strongly oppose the proposed rule and urge CMS to maintain the prohibition against nursing home pre-dispute arbitration agreements.

I. Forced Arbitration Hurts Nursing Home Residents, Their Families & U.S. Taxpayers

1. Residents & Families

Nursing home residents are among our most vulnerable citizens. By definition, they require 24-hour a day monitoring and care. When an individual needs nursing home placement, it is typically a situation that is highly stressful, with limited time or opportunity to consider options

and make choices. *Mom had a medical emergency and wound up in the hospital. Now the hospital is pushing her to get out and she can't live safely at home. Family has a couple of days to figure out what's going on with her health, her finances, her house, her insurance and get her into a nursing home.*

It is in this process that Mom, perhaps with a family member, will be given a pile of paperwork to sign. If there is a pre-dispute arbitration agreement in the pile, Mom and her family have just signed away their Constitutional right to ever go to court should she be harmed at any time in the future due to substandard care, abuse or neglect.

Six months from now they find out that Mom has been physically or even sexually abused by staff? *They are bound by the facility's arbitration plan.* A year from now they find out that nobody has been monitoring or repositioning Mom according to her care plan and now she has horrible pressure ulcers? *They are bound by the facility's arbitration plan.* Two years from now Mom has a stroke and dies after being chemically restrained with dangerous antipsychotic drugs without the family's knowledge or consent? *They are bound by the facility's arbitration plan and prohibited from seeking justice in court.*

In reality, there is little or no opportunity to read – no matter review and consider – the terms of mandatory, pre-dispute arbitration agreements in nursing home residency contracts. Moreover, even if arbitration agreements were explained, residents and their families would be highly unlikely, at the time of admission, to be anticipating the need for litigation against the facility. They would be hoping and expecting that care would be excellent; they would not want to indicate to the facility, at admission, that they were expecting problems and poor care.

In addition, **unlike other commercial settings, nursing home residents cannot (generally speaking) walk out when their nursing home abuses them or provides substandard care.** They are, often literally, a captive audience.

2. U.S. Taxpayers

Nursing homes are a multi-billion dollar industry, with most of that care being paid for by taxpayers through Medicaid and Medicare. Medicaid pays for the majority of long term care and Medicare pays for the majority of rehab care. **When nursing homes are not held accountable for providing decent care that meets minimum standards, it means that taxpayers are paying for services that are subpar or even worthless.** In addition, we generally wind up also paying to fix the results of poor care, such as increased hospitalizations, enhanced therapeutic treatments, etc....

Importantly, **lack of accountability perpetuates a system in which it is both acceptable and profitable to provide poor care.** Poor care persists in our nursing homes for one simple reason: the State Agencies systematically fail to enforce minimum standards and ensure that residents are safe. In the absence of meaningful enforcement, the ability to sue for serious abuse, neglect and wrongful death is often the only way to hold providers accountable when they fail us. In addition, it sends an important message to the industry that they will be held accountable when they fail our residents and fail to provide value for the money we pay them.

II. The Desperate Need For Greater Accountability in U.S. Nursing Homes

In truth, **when nursing homes provide decent care and treat their residents with dignity, residents and families don't go to court.** Unfortunately, too many of our nation's nursing homes have longstanding problems.

1. LTCCC Report: U.S. Nursing Homes With Chronic Deficiencies in Care (2017)¹

Deficiencies in care in nursing homes are, unfortunately, quite common, with an average citation rate of seven (7) deficiencies identified and substantiated per nursing home per year. Earlier this year, LTCCC reported on deficiency data (presented on our website, www.nursinghome411.org) for nursing homes that not only have recurring deficiencies from one year to the next but, in addition, have what we call "chronic deficiencies": citations for the same deficiency category three times in the three years covered on Nursing Home Compare). Our findings indicate that **an astonishing 42% of U.S. nursing homes have chronic deficiencies.** How can this be acceptable for any nursing home entrusted with caring for frail elderly individuals, let alone close to half of our nursing homes?

2. LTCCC Study: Safeguarding Nursing Home Residents & Program Integrity (2015)²

In 2015, our organization conducted a study to assess the ability of the State Agencies to (1) protect nursing home residents and (2) assure appropriate use of the billions of taxpayer dollars spent on nursing home care each year. Following are some of our key findings:

- **Missing resident harm.** Reviewing the three year's covered in the CMS Nursing Home Compare database, we found that less than five percent (5%) of nursing home deficiencies were identified as causing any harm or immediate jeopardy to a resident's

¹ *Chronic Deficiencies in Care: The Persistence of Recurring Failures to Meet Minimum Safety & Dignity Standards in U.S. Nursing Homes*, Mollot, Richard, The Long Term Care Coalition (2017). Available at <http://nursinghome411.org/nursing-homes-with-chronic-deficiencies/>.

² *Safeguarding Residents & Program Integrity in New York State Nursing Homes: An Assessment of Government Agency Performance*, Mollot, Richard, The Long Term Care Coalition (2015). Available at <http://nursinghome411.org/national-report-safeguarding-nursing-home-residents-program-integrity/>.

well-being. Because, generally speaking, only findings of harm result in a penalty against the nursing home, this means that **penalties for deficiencies in care or services are exceedingly rare, even when residents are, in fact, harmed** and/or taxpayers have footed the bill for substandard or worthless services.

- **Antipsychotic drugging** of nursing homes residents is a dangerous and pervasive problem, despite the FDA’s “Black Box” warning against use of these drugs on elderly people with dementia. Our study found that the average risk-adjusted state antipsychotic drugging rate is 18.95% while the average state citation rate is 0.31%. This indicates that **there is a significant amount of inappropriate antipsychotic drugging that is not being cited by the states**. We also looked at state citations for inappropriate drugging that were cited as having caused harm to one or more residents (G or higher on the scope and severity matrix). The data indicated that, on average, states only find two percent (2%) of all F-329 violations as having caused any harm to residents. Given the known significant dangers of these drugs, widely publicized since the FDA’s warning ten years earlier, we believe this is a striking and troublesome finding. If giving residents drugs that are both highly dangerous and not clinically indicated is not harm, what is?
- **Pressure ulcers**. “Pressure ulcers are serious medical conditions and **one of the important measures of the quality of clinical care in nursing homes**,” according to the CDC.³ According to the *Journal of Wound, Ostomy & Continence Nursing*, “In the vast majority of cases, appropriate identification and mitigation of risk factors can prevent or minimize pressure ulcer (PU) formation.”⁴ Nevertheless, we found that pressure ulcers are a problem for over 86,000 nursing home residents. **Though pressure ulcers are largely preventable, states cite nursing homes the equivalent of less than 3% of the time that a resident has a pressure ulcer**. When states *do* cite a facility for inadequate pressure ulcer care or prevention, they only identify this as harmful to residents about 25% of the time. How can a pressure ulcer not be harm?!
- **Staffing**. Staffing levels are one of the most (if not the most) important indicators of a nursing home’s quality and safety. A landmark federal study in 2001 found that 97% of facilities failed to meet one or more staffing requirements and 52% failed to meet all staffing requirements necessary to prevent avoidable harm to residents.⁵ The analysis

³ NCHS Data Brief No. 14, February 2009.[Emphasis added.] Available at <https://www.cdc.gov/nchs/products/databriefs/db14.htm>.

⁴ *J Wound Ostomy Continence Nurs.* 2014 Jul-Aug;41(4):313-34. doi: 10.1097/WON.0000000000000050. Abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/24901936>.

⁵ Abt Associates (Prepared for the Centers for Medicare and Medicaid Services), *Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes*, Report To Congress: Phase II Final (December 2001).

determined that **91% of nursing homes lacked sufficient staff to provide decent care.** Unfortunately, this situation continues today. Though sufficient staff has been identified as critical to good care, and insufficient staffing is known to be a widespread problem, **insufficient staffing is rarely cited.** Our study found that the annual rate of staffing deficiencies per resident is infinitesimal: 0.036%. Less than 5% of those deficiencies are identified as resulting in harm to residents.

3. **U.S. Inspector General Study of Medicare Rehab in Nursing Homes (2014)**⁶

- In this important study, the DHHS OIG found that **an astounding one-in-three short term, Medicare nursing home patients are harmed** within a month of entering a nursing home.
- Physician reviewers found that **59% of the time, these adverse events and incidents of harm, including falls, pressure ulcers and medication errors, were preventable.**
- OIG calculated that, as a result, 1,538 residents died, 10,742 residents experienced harm and Medicare paid \$208 million for hospitalizations of nursing home residents, just in the month of August 2011.

III. Conclusion

- Pre-dispute arbitration clauses in nursing home contracts undoubtedly exacerbate a situation that is, by its nature, heavily weighted against vulnerable nursing home residents and their families.
- Arbitration can only be a fair choice when it is entered into on an *ad hoc* basis, when the reasons for a dispute are known and both parties have the opportunity to consider their best options.
- Pre-dispute arbitration in nursing homes fundamentally robs residents who have been seriously harmed as a result of abuse or neglect of any chance to be heard or seek redress in a meaningful way.

Our June 30 review of the comments submitted (to date) in response to this NPRM⁷ indicated that an overwhelming majority of commentators oppose allowing pre-dispute arbitration agreements in nursing homes. Many spoke eloquently of the disastrous impact a change in the

⁶ *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, Report OEI-06-11-00370 (February 2014). Accessed at <http://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf>.

⁷ <https://www.regulations.gov/docket?D=CMS-2017-0076>.

LTCCC Comments: Pre-Dispute Binding Arbitration

rule would have. As one commentator wrote, “**This is truly a license to abuse without punishment.**”⁸

We appreciate this opportunity to provide these comments in support of improving fairness and accountability for nursing home residents, their families and tax-paying Americans.

Sincerely yours,



Richard J. Mollot
Executive Director
Long Term Care Community Coalition

On behalf of:

Arkansas Advocates for Nursing Home Residents

Coalition of Institutionalized Aged & Disabled

Elder Justice Committee of Metro Justice, a Chapter of Citizen Action of New York

Families for Better Care

Massachusetts Advocates for Nursing Home Reform

Kansas Advocates for Better Care

New York City Long Term Care Ombudsman Program

North Carolina Friends of Residents in Long-Term Care

Texas Advocates for Senior Care

⁸ Comment ID: CMS-2017-0076-0257. [Emphasis added.]